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Supreme Court, U.S.
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No. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1997

GARLAND DENTY,

PETITIONER,

v.

SMITHKLINE BEECHAM CORPORATION,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq., and the Pennsylvania Human Relations Act, 43 Pa.C.S. § 951 et seq., are applicable to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, Pennsylvania, in the employ of a United States subsidiary controlled by a foreign parent corporation not itself controlled by an American corporation, where the promotional opportunity is a position with the foreign corporation outside the United States?

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PETITION FOR WRIT OF CERTIORARI

Garland Denty ("Denty") prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in these proceedings on March 17, 1997, involving an important question of federal law which has not been but should be settled by this Court, and on which the appellate court's decision conflicts with relevant analogous decisions of this Court and other Courts of Appeal.

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OPINIONS BELOW

The March 17, 1997 opinion of the United States Court of Appeals for the Third Circuit is reprinted in the Appendix at App. A-1 to A-9. The opinion of the District Court is set forth in *Denty v. SmithKline Beecham Corp.*, 907 F.Supp. 879 (E.D.Pa. 1995), reprinted at App. A-10 to A-20. Denty sought and was granted permission to appeal from that decision on a certified question pursuant to 28 U.S.C. § 1292(b). The District Court's May 10, 1996 order granting Denty's

motion for certification to allow an interlocutory appeal is reprinted at page App. A-21 to A-22. The decision of the United States Court of Appeals for the Third Circuit granting Denty' petition for permission to appeal from the certified interlocutory order, granted on June 21, 1996, is reprinted at page App. A-23 to A-24. The Question Presented for Review to this Court is identical to the question certified for review below.

JURISDICTION

The Court of Appeals entered its judgment on March 17, 1997. Pursuant to Supreme Court Rule 13.1, this Petition has been filed within 90 days of the order of which review is sought. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED IN THIS CASE

The Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 *et seq.*, provides in pertinent part:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

> individual's age[ ]. . .

29 U.S.C. § 623(a).

The Pennsylvania Human Relations Act ("PHRA"), 43 Pa.C..S. § 951 *et seq.*, likewise provides in pertinent part:

> It shall be an unlawful discriminatory practice . . . For any employer because of ... age ... to refuse to hire or employ, or to bar or to discharge from employment such individual, or to otherwise discriminate against such individual with respect to compensation, hire, tenure, terms, conditions or privileges of employment ....

43 Pa.C.S. § 955(a).

Denty submits that the 1984 amendments to the ADEA are not relevant to his claim, because he was at all times employed in the United States. However, because the District Court and the Court of Appeals relied upon those amendments, they are reproduced as follows:

First, the definition of "employee" was expanded to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). Second, at the same time, Congress also enacted § 623(h):

> **Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control**

(1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.

(2) The prohibitions of this section shall not apply where the employer is a foreign person[1] not controlled by an American employer.

(3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the

(A) interrelations of operations,
(B) common management,
(C) centralized control of labor relations, and
(D) common ownership or financial control,

of the employer and the corporation.

29 U.S.C. § 623(h).

The PHRA is silent as to the territorial limits of its reach.

Statement of the Case

On December 23, 1993, Denty filed a Complaint in the United

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[1] "The term person means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 630(a)

States District Court for the Eastern District of Pennsylvania against his employer, SmithKline Beecham Corp. ("SB Corp"), a Pennsylvania corporation, alleging violations of both the ADEA and the PHRA. Denty alleged that he was discriminated against by being denied several promotional opportunities due to his age, and that later he was retaliated against after he filed his charge of discrimination. Jurisdiction in the District Court over the ADEA claims for discrimination and retaliation was invoked pursuant to 28 U.S.C. §§ 1331 and 1337. Jurisdiction over the corresponding PHRA claims was based upon 28 U.S.C. § 1367.

SB Corp is a wholly owned subsidiary of SmithKline Beecham, Plc ("SB Plc"), which is a corporation organized under the laws of the United Kingdom. The pharmaceuticals business of the company ("SB Pharmaceuticals"), in which Denty worked, crosses these corporate lines, and functions as a unified corporate division in England, in the United States and elsewhere insofar as operations, management, labor relations, and financial controls are concerned. The American subsidiary is controlled by its English parent. *Denty v. SmithKline*

Beecham Corp., 907 F.Supp. at 886, App. A-19.

Denty was the Director of Manufacturing Operations/Technical Services, International in Worldwide Technical Operations for SB Pharmaceuticals. He was employed in Philadelphia. Although he was technically an employee of SB Corp., he reported directly to senior executives who were technically employed by SB plc.

In August, 1992, Worldwide Technical Operations was reorganized. As a result of this reorganization, four new positions were created which represented promotional opportunities for Denty, for which he was qualified. Three of these positions were to be based in the United Kingdom, where the position holder would be an employee of SB plc. The fourth position was to be located in Australia, where the position holder would be either an employee of SB plc or some other SmithKline Beecham corporation other than SB Corp. Denty was passed over for promotion, while each of these positions was filled by other, significantly younger individuals who were, Denty submits, less qualified and had less experience. Denty alleges that he was passed over for promotion because of his age.

On August 4, 1995, SB Corp moved for summary judgment on Counts I and III of the Complaint (Denty's claims for age discrimination under the ADEA and PHRA respectively).[2] On November 7, 1996, the Court granted SB Corp's motion for summary judgment, holding that neither the ADEA nor the PHRA applied to a decision by a foreign corporation about whether or not to *promote* an employee *working in the United States* to a position in a foreign country.[3]

The District Court accepted the settled law that "the site of the

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[2] Counts II and IV, not here in issue, asserted the retaliation claims.

[3] The District Court also found the distinction between SB Corp. and SB plc in terms of who had been Denty's technical employer not to be an issue. SB Corp had argued that it was entitled to summary judgment because Denty had not named the proper defendant, SB plc. However, the District Court made it clear that if it were, at that late date, to allow SB Corp to raise the defense that it was not the proper party, it would also allow Denty to amend his Complaint to join SB Plc. What was important to the District Court, and to the Court of Appeals, was that the controlling entity was a foreign corporation. This is clearly reflected by the fact that the question certified for review by both courts phrased the issue as one of *promotion,* not of new hire.

workplace determines the applicability of the ADEA," but then ruled that "the relevant work site is the location of [the position for which the plaintiff applied], not the location of Denty's employment at the time of the alleged discrimination." The District Court also held that the ADEA does not distinguish in this regard between claims for failure to hire and failure to promote. *Denty v. SmithKline Beecham Corp.*, 907 F.Supp. at 884, App. A-16 - A-17.

The matter was then presented to the Court of Appeals on Denty's petition for permission to appeal from the certified interlocutory order. The petition was granted, the appeal briefed and argued, and the Third Circuit affirmed the District Court's decision.

The Court of Appeals held, relying upon the 1984 amendments to the ADEA, that "the ADEA does not apply when a foreign corporation controls an American corporation and the employment is with the foreign parent abroad."[4] App. A-9. In so holding, the Court

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[4] The Court of Appeals held that the PHRA claim must also be dismissed as "no evidence exists to show the Pennsylvania legislature intended to apply the PHRA to employment decisions made by foreign corporations for

(continued...)

of Appeals determined that the relevant work site for ADEA purposes was the site of the position to be filled, and that the ADEA did not distinguish between failure to hire and failure to promote situations in this regard. App. A-7, at fn 5.

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REASONS FOR GRANTING THE WRIT

I. When an individual is employed in the United States, the question of whether the opportunity to be promoted is a "term, condition or privilege" of current employment which is protected by federal laws against employment discrimination even if the employer is a foreign corporation and the promotion will be to a position in a foreign land, is an important question which has not been, but should be, settled by the Supreme Court.

More and more of America's workers are employed by foreign corporations, or by domestic corporations controlled by foreign parents. This case thus raises the important issue of the reach of this nation's equal employment opportunity laws against the backdrop of the increasing globalization of commerce by multinational corporate employers. Consideration for promotion is unquestionably a term,

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[4](...continued)
positions located outside the United States." App. A-9.

condition or privilege of employment, which may not in this country be doled out in a discriminatory fashion. The question of whether a foreign employer is exempt from the ADEA merely because the work site of the promotional opportunity is outside the United States is of great significance to every employee who hopes to work his or her way up the corporate ladder. *In addition, because Title VII of the Civil Rights Act of 1964 contains the same language as the ADEA, see 42 U.S.C. § 2000e-1(c), this case presents an issue which transcends the question of age discrimination, and potentially impacts every employee who has been the victim of discrimination based upon race, color, religion, sex, national origin or disability as well.*

Neither this Court nor any other Court of Appeals has addressed the precise question presented here. Nevertheless, this case is uniquely suited to be the one in which the issue is decided. The facts are simple and straightforward. Whether or not age was a determinative factor in the decision not to promote Denty is not contested by defendant at this stage of the proceedings. This matter is before the Court on a motion for summary judgment and defendant has not contended that there is

insufficient evidence from which a jury could conclude that age was a determinative factor. The courts below have also concluded that there is sufficient evidence from which a jury could conclude that this was a true promotional opportunity, not a new hire situation. There are no other issues to clutter the record or deflect anyone's focus. Even the issue itself has already been framed by the courts below.

Finally, as will be shown below, it is important for the Supreme Court to settle this question because the Court of Appeal's decision materially conflicts with the language of the ADEA, and its reasoning cannot be squared with, and tends to undermine, the logic underlying decisions of this Court and other Courts of Appeal.

II. The logic of the decision of the Third Circuit that, when a foreign corporation denies a promotion overseas to an individual employed by it in the United States, it is free to base that decision on the employee's age, conflicts with relevant decisions of the Supreme Court and of other United States Courts of Appeal.

The Third Circuit was able to reach its conclusion that, when a foreign corporation denies a promotion overseas to an individual employed by it in the United States, it is free to base that decision on the employee's age, only because it first decided that, for the purpose

of determining the territorial applicability of the ADEA. the relevant work site is where the individual will be located after promotion. It was able to make that decision, in turn, only because it held that the ADEA does not distinguish between failure to hire and failure to promote situations. App. at A-7, fn 5. It was able to so hold only by completely ignoring this Court's decision in *Hishon v. King & Spalding,* 467 U.S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984), a case upon which Denty relied heavily in his brief to the Third Circuit. In *Hishon*, the Supreme Court considered the failure to promote a female associate attorney to partnership in a law firm, allegedly based upon her sex.[5] This Court drew a clear distinction between initial hiring and opportunity for promotion in footnote 5 of its Opinion:

> Title VII also may be relevant in the absence of an existing employment relationship, as when an employer *refuses* to hire someone.... However, discrimination in that circumstance does not concern the "terms, conditions, or privileges of employment," which is the focus of the present case.

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[5] Advancement from the status of associate to that of partner in a law firm is, without question, a promotion. *Ezold v. Wolf, Block, Schorr and Solis-Cohen,* 983 F.2d 509, 522-31, *passim,* (3d Cir. 1992).

467 U.S. at 74, 104 S.Ct. at 2233.[6] The Court continued:

> The contractual relationship of employment triggers the provision of Title VII governing "terms, conditions, or privileges of employment." Title VII in turn forbids discrimination on the basis of "race, color, religion, sex, or national origin."

Id. at 74, 104 S.Ct. at 2233. Following that logic to its inevitable conclusion, the Court, in holding that plaintiff had stated a cause of action under Title VII, stated:

> [a] benefit that is part and parcel of the employment relationship may not be doled out in a discriminatory fashion .... Those benefits that comprise the `incidents of employment,' ... or that form `an aspect of the relationship between the employer and employees,' ... may not be afforded in a manner contrary to Title VII.

467 U.S. at 75-76, 104 S.Ct. at 2234 (citations omitted).

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[6] Of course, Title VII precedent may be relied upon in construing the substantive provisions of the ADEA, since those substantive provisions "were derived in haec verba from Title VII." *Trans World Airlines, Inc. v. Thurston,* 469 U.S. 111, 121, 105 S.Ct. 613, 83 L.Ed.2d 523 (1985), citing *Lorillard v. Pons,* 434 U.S. 575, 584 n.12, 98 S.Ct. 866, 872 n.12, 55 L.Ed.2d 40 (1978). Pennsylvania courts also uniformly hold that the PHRA should be interpreted consistent with Title VII and the ADEA. *See, Jacques v. Akzo International Salt, Inc.,* 422 Pa.Super. 419, 421, 619 A.2d 748 (1993).

In short, the right of an individual employed in the United States to equal consideration for promotion is a "term, condition or privilege of employment" protected by equal employment opportunity laws, including the ADEA. Therefore, application of the ADEA, or any other federal law governing employment discrimination, to a claim by an individual employed in the United States, who alleges discrimination in the terms and conditions of his employment, does not *by definition* involve extraterritorial application. It is, rather, consistent with settled law and traditional ADEA and Title VII analysis that the site of the employee's workplace **at the time of the discriminatory decision** is what determines whether American discrimination laws apply. See, *Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984); *DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C.Cir. 1985); *Pfeiffer v. Wm. Wrigley, Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984); *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984); *Wolf v. J.I. Case Co.*, 617 F.Supp. 858 (E.D. Wisc. 1985); *Belanger v. Keydril Co.*, 596 F.Supp.

823 (E.D.La. 1984).

That the effect of the promotion might be to place the individual in a position where he or she is no longer protected by the ADEA or Title VII just is not a relevant consideration. What is relevant is the protected status of the individual at the time of his or her application for the promotion sought. *Hishon,* 476 U.S. at 74-6, 104 S.Ct. at 2233-34.

The Third Circuit cited the decision of the Eleventh Circuit in *Lopez v. Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987) as "indistinguishable" from the present case. App. A-7, footnote 5. In fact, however, the Third Circuit's decision directly conflicts with the logic underlying *Lopez.* In *Lopez*, which involved facts arising prior to the 1984 amendments, the plaintiff applied in the United States to a domestic company for *initial* employment in Caracas, Venezuela. Noting that application of the ADEA depended upon the site of the employee's work place, the court in *Lopez* distinguished a long line of established precedent[7] on the basis that the plaintiffs in those cases, like

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[7] *DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282; *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121; *Pfeiffer v. Wm.*

(continued...)

Denty, were already employees of the defendants and had existing work stations when they were the victims of allegedly discriminatory conduct. It was only because the plaintiff in *Lopez* had no existing workstation that the Eleventh Circuit concluded it should look to the site of the *anticipated* work station to determine the applicability of the *ADEA*. It did this in order to be consistent with the established "situs of the work station rule" and to avoid the rejected "place of decision" concept. *Lopez*, 813 F.2d at 1119.

The Third Circuit's decision also directly conflicts with the logic underlying the decision of the Tenth Circuit in *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984). In that case, also involving facts which arose prior to the 1984 amendments, the ADEA was found inapplicable to an employee denied a *transfer* from a position overseas to a position in the United States, because the situs of his present workplace, not his prospective workplace, controlled. In

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[7](...continued)
Wrigley, Jr. Co., 775 F.2d 554; *Cleary v. United States Lines, Inc.*, 728 F.2d 607; *Zahourek v. Arthur Young & Co.*, 750 F.2d 827; *Thomas v. Brown & Root, Inc.*, 745 F.2d 279.

dicta, the Tenth Circuit noted that it would have applied the ADEA if the employee were being transferred from a position within the United States to a position in a foreign country, precisely Denty's situation.

The lower courts' decisions in this case thus cannot be reconciled with the Eleventh Circuit decision in *Lopez*, the Tenth Circuit's decision in *Zahourek* or this Court's decision in *Hishon.* They operate to deny the protection of equal employment opportunity laws to individuals working in the United States for foreign employers on the grounds that their new status, if promotion were granted, would take them out of the protected class, in direct contravention of both precedent and legislative intent.

Also of concern is the fact that, to support their decision in this case, the courts below have turned the 1984 amendments to the ADEA on their head. Those amendments expanded the scope of the ADEA by extending the reach of the statue to American citizens employed overseas by American employers or by entities controlled by American employers. Thus, the prospective employee of the American corporation in *Lopez* would have been protected even though his job

posting would have been in Venezuela, and the employee of the American employer in *Zahourek* who sought a transfer from overseas back to the United States would have been protected as well. The amendments were never intended to *restrict* the reach of American employment discrimination laws in the fashion adopted by the Court of Appeals here. *Helm v. South African Airways*, 44 Fair Empl. Prac. Cas. (BNA) 261, 43 Empl. Prac. Dec. (CCH) ¶37,303 (S.D.N.Y. 1987).

To the extent this Court does not review the decision below, the Third Circuit's decision will provide logical support for future restrictions on the protections afforded American employees by the ADEA and Title VII. This Court should reemphasize that the 1984 amendments to the ADEA are irrelevant to individuals whose work stations are within the territorial jurisdiction of the United States.

III. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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Filed March 17, 1997

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 96-1554

GARLAND DENTY,
Appellant

v.

SMITHKLINE BEECHAM CORPORATION;

(Caption amended per the Clerk's 7/22/96 order)

Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civ. No. 93-cv-06978)

Argued
February 6, 1997
Before: STAPLETON and MANSMANN, *Circuit Judges*
and RESTANI, *Judge*.*

(Filed March 17, 1997)

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* Honorable Jane A. Restani, Judge, United States Court of International Trade, sitting by designation.

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OPINION OF THE COURT

MANSMANN, *Circuit Judge.*

Before us is the certified question of whether the Age Discrimination in Employment Act and the Pennsylvania

Human Relations Act are applicable to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, Pennsylvania, in the employ of a United States subsidiary controlled by a foreign parent corporation not itself controlled by an American corporation, where the promotional opportunity is a position with the foreign corporation outside the United States. Because we do not believe Congress intended the ADEA should be applied extraterritorially under the facts here, we will affirm the judgment of the district court.

I.

The relevant facts on summary judgment are not disputed. In 1984, Garland Denty was hired by Smith Kline French, a Pennsylvania corporation, as Director of Quality Assurance. Denty held this job until January 1989, when he was given the title, Director of Manufacturing Operations/Technical Services, International. Denty held these positions at Smith Kline's Philadelphia office. Smith Kline subsequently merged with the Beecham Group plc, a British corporation in 1989; the resulting corporation, SmithKline Beecham plc (SB plc), is incorporated and headquartered in the United Kingdom. Denty continued working for SmithKline Beecham Corporation (SBC), the wholly-owned American subsidiary of SB plc.

As a consequence of the merger, five new positions were created with SB plc in foreign locations. Denty alleges that in 1990, he was told he would be promoted to one of these positions. Yet, he was subsequently denied the promotion allegedly because of his age which, at that time, was fifty-two. Denty further contends that these positions were filled with men younger than he. The promotion decisions were made by SB plc executives in England while Denty worked for SBC in Philadelphia.

On December 27, 1993, Denty instituted the present action against SBC,[1] alleging violations of the ADEA and

1. The district court considered whether SBC was the proper defendant. The court resolved the issue by ruling that it would allow Denty leave to amend his complaint to name SB plc as a defendant if it did not rule against him on SBC's summary judgment motion. *Denty v. SmithKline Beecham Corp.*, 907 F.Supp. 879, 881-82 (E.D.Pa. 1995).

PHRA for failure to promote, deprivation of employment opportunities, and age discrimination. Thereafter, SBC filed a motion for summary judgment, arguing *inter alia* that the ADEA did not apply to Denty's failure-to-promote claim. The district court granted summary judgment for SBC on the failure-to-promote claim. In so doing, the district court found that the statutory language of the ADEA, and by extension the PHRA, did not provide for extraterritorial application of the Act against a foreign corporation for failure to promote to positions outside of the United States. The court specifically ruled that "[t]he relevant work site is the location of [the position for which the plaintiff applied], not the location of Denty's employment at the time of the alleged discrimination." *Denty v. SmithKline Beecham Corp.*, 907 F.Supp. 879, 884 (E.D. Pa. 1995). The court further opined that there was no distinction in the ADEA between a "failure to hire" case, in which the discrimination occurs in the country where the job site is located, and a "failure to promote" situation. *Id.* Finally, the district court rejected Denty's contention that SBC and SB plc were indistinguishable and should be considered as a "single employer," holding instead that the proper inquiry was "whether Denty sought employment with an employer 'controlled' by an American firm." *Id.* at 885.

Denty then moved for certification to allow an immediate appeal pursuant to 28 U.S.C. § 1292(b), which the district court granted on May 10, 1996. The question certified for appeal is:

> whether the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act are applicable to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, PA, in the employ of a foreign corporation not controlled by an American corporation, where the promotional opportunity is a position with that same foreign corporation outside the United States?

Denty petitioned for permission to appeal under 28 U.S.C. § 1292(b) from a certified interlocutory order of the district court. We granted Denty's motion on June 21, 1996.

We review the district court's grant of summary judgment de novo. *Antol v. Perry*, 82 F.3d 1291, 1294-95 (3d Cir. 1996).

II.

We begin our analysis with the longstanding principle of American law that "legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States." *EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991). The Supreme Court stated that in applying this rule, courts should determine if the "language in the [relevant Act] gives any indication of a congressional purpose to extend its coverage beyond places over which the United States has sovereignty or has some measure of legislative control." *Id.* (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). If Congress wishes to go beyond the purely domestic realm, there must be an "affirmative intention . . . clearly expressed." *Id.* (quoting *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957). We turn, therefore, to the plain language of the ADEA.

Codified at 29 U.S.C. § 623(a), the ADEA states in pertinent part:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age[ ] . . . .

Prior to 1984, the ADEA did not contain any provision addressing extraterritorial reach. Instead, the ADEA adopted language from the Fair Labor Standards Act, 29 U.S.C. §§ 216(d) and (e), which provided that no "employee whose services during the workweek are performed in a workplace within a foreign country" was protected. Consequently, we held in *Cleary v. United States*, 728 F.2d 607, 610 (3d Cir. 1984), that the ADEA could not be applied to Americans employed outside the United States by American employers.

In 1984, Congress responded to *Cleary* and subsequent

cases[2] by amending the ADEA to provide for limited extraterritorial application. First, Congress amended the definition of "employee" to include "any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). Second, Congress enacted the key provision in this case, 29 U.S.C. § 623(h),[3] which states:

> **Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control**
>
> (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.
>
> (2) The prohibitions of this section shall not apply where the employer is a foreign person[4] not controlled by an American employer.
>
> (3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the—
>
> (A) interrelation of operations,
>
> (B) common management,
>
> (C) centralized control of labor relations, and
>
> (D) common ownership or financial control,

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2. *See, e.g., Lopez v. Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987); *S.F. DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1986); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985); *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554 (7th Cir. 1985); *Zahourek v. Arthur Young and Co.*, 750 F.2d 827 (10th Cir. 1984); *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984).

3. This subsection was originally codified as 29 U.S.C. § 623(g), creating the incongruity of two subsection "g's." This mistake was remedied by a 1986 amendment.

4. "The term 'person' means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized group of persons." 29 U.S.C. § 630(a).

of the employer and the corporation.

As the Supreme Court noted in *Arabian*, "[t]he expressed purpose of these changes was to 'mak[e] provisions of the Act apply to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries.' " 499 U.S. at 259 (quoting S. Rep. No. 98-467, at 2 (1984), *reprinted in* 1984 U.S.C.C.A.N. 2974, 2975).

Viewing the 1984 amendments together, the district court here concluded that the "ADEA applies abroad only when (1) the employee is an American citizen and (2) the employer is controlled by an American employer." 907 F.Supp. at 883. Our reading of the plain language of the statute compels us to agree.[5] The legislative history likewise necessitates this conclusion:

> The purpose behind the amendment is to insure that the citizens of the United States who are employed in a foreign workplace by U.S. corporations or their subsidiaries enjoy the protections of the [ADEA]. When considering this amendment, the Committee was cognizant of the well-established principle of sovereignty, that no nation has the right to impose its labor standards on another country. That is why the amendment is carefully worded to apply only to citizens

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5. As the district court noted, the employment decisions at issue involved Denty's application for positions in the United Kingdom and Australia. The relevant work site for ADEA purposes, therefore, is the location of these positions. We find support for this conclusion in the fact that the language of the ADEA does not distinguish between failure to hire and failure to promote situations. Accordingly, we find *Lopez v. Pan Am World Servs., Inc.*, 813 F.2d 1118 (11th Cir. 1987), indistinguishable from the case before us. Nor does the Tenth Circuit's decision in *Zahourek v. Arthur Young and Co.*, 750 F.2d 827 (10th Cir. 1984), inform our decision here. There, the court of appeals held that the ADEA did "not apply to the termination of employment of an American citizen by an American employer where, as here, the 'workplace' is Honduras." *Id.* at 828-29 (footnote omitted). The 1984 amendment to the ADEA, without reference to where the discriminatory effect occurred, now specifically protects a person in Zahourek's position: an American citizen working for an American company abroad. Indeed, the focus of the amendment is now upon the degree of control exercised by an American company over the conduct of the discriminating corporation.

> of the United States who are working for U.S. corporations or their subsidiaries. It does not apply to foreign nationals working for such corporations in a foreign workplace and it does not apply to foreign companies which are not controlled by U.S. firms. Moreover, it is the intent of the Committee that this amendment not be enforced where compliance with its prohibitions would place a U.S. company or its subsidiary in violation of the laws of the host country.[6]

S. Rep. No. 98-467, at 2, *reprinted in* 1984 U.S.C.C.A.N. at 3000-01. We emphasize that the job for which Denty applied is in the United Kingdom with the parent company, not in the United States with the subsidiary.

The EEOC guidelines, promulgated in response to the 1984 amendments, do not convince us otherwise. The guidelines provide that "the ADEA does not apply to foreign firms operating outside the United States, unless those firms are controlled by U.S. employers. On the other hand, the ADEA does apply to foreign firms operating on U.S. soil." EEOC Policy Guidance, N-915.039, Empl. Prac. Guide (CCH) 5183, 6531 (March 3, 1989). Here the record is clear that Denty is currently employed by a U.S. subsidiary of a British parent corporation. SB plc controls the American subsidiary, not the other way around. Clearly, then, the ADEA cannot be applied extraterritorially to create liability on the part of SB plc given the facts of this case.

We reject the EEOC's argument that by failing to apply the ADEA extraterritorially here, Denty will fall into a "black hole." To the contrary, Denty does not fall into a "black

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6. The Committee codified their intent at 29 U.S.C. § 623(f), which reads in pertinent part:

> It shall not be unlawful for an employer . . . to take any action otherwise prohibited under subsection[ ] (a) . . . where such practices involve an employee in a workplace in a foreign country, and compliance with such subsection[ ] would cause such employer, or a corporation controlled by such employer, to violate the laws of the country in which such workplace is located[.]

This section has been commonly referred to as the "foreign law exception."

hole"—he is protected by British law. The fact that British law does not protect individuals forty years of age or older from discrimination is not our concern. Moreover, Congress considered the possibility of a "black hole" and yet chose not to extend the ADEA, recognizing the well-established principle of sovereignty. The EEOC's argument, thus, misses the mark.

The language of section 623(h)(2) could not be more clear —the ADEA does not apply when a foreign corporation controls an American corporation and the employment is with the foreign parent abroad. Accordingly, we will affirm the judgment of the district court.[7]

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

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7. Denty's failure-to-promote claim under the Pennsylvania Human Relations Act (PHRA) must likewise be dismissed as no evidence exists to show the Pennsylvania legislature intended to apply the PHRA to employment decisions made by foreign corporations for positions located outside the United States.

GARLAND DENTY, Plaintiff
v.
SMITHKLINE BEECHAM CORP., Defendant

CIVIL ACTION NO. 94-6978

UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

907 F. Supp. 879;
1995 U.S. Dist. LEXIS 16831;
69 Fair Empl. Prac. Cas. (BNA) 376
November 7, 1995, FILED, ENTERED

OPINION

Plaintiff Garland Denty alleges that defendant SmithKline Beecham Corporation (SBC) denied him promotions due to his age, in violation of the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634, and the Pennsylvania Human Relations Act (PHRA), 43 Pa. C.S.A. §§ 951-963. Plaintiff also alleges that the defendant violated the ADEA and the PHRA by "creating intolerable working conditions for Plaintiff because of his age and because he filed a complaint of discrimination." Complaint, P 33. SBC has moved for summary judgment on the failure-to-promote claims. Defendant's primary contention is that the extraterritorial application of the ADEA and the PHRA do not reach this case because the positions plaintiff sought were located outside the United States for an English company.

I. Factual Background

In 1984, Garland Denty was hired by Smith Kline French, a Pennsylvania corporation, as Director of Quality Assurance, a job he held until January 1989, when he was given the title Director of Manufacturing Operations/Technical Services, International. Denty performed these jobs at SmithKline's offices in Philadelphia. In April 1989, SmithKline merged with the Beecham Group plc., a British corporation. The resulting company was called SmithKline Beecham plc (SB plc). According to its 1994 annual report, filed with the SEC, SB plc is organized under the laws of England,

and its headquarters are located in Brentford, Middlesex, England. Plaintiff's Ex. 21, at 1. The defendant, SBC, is the American branch of SB plc. It is a wholly-owned subsidiary of SB plc.

A great deal of reorganization followed the merger, including the creation of certain new positions. According to plaintiff, in 1990, he was told that he would be promoted to Vice-President of Technical Services/Plant Operations. Later that year, however, plaintiff allegedly was informed that he would not be promoted to this position because of his age. At the time, plaintiff was 52 years old. Plaintiff claims that in 1992 he applied for four other positions at the vice-president level -- the exact job titles do not appear in plaintiff's complaint -- and that he was denied these positions on the basis of age. Plaintiff alleges that all these positions were filled by men younger than himself.

The promotion decisions at issue in this case were made by SB plc executives in England, while Denty worked for SBC in Philadelphia. It is undisputed that all the positions Denty sought were based outside the United States. [8]

II. Whether SBC Is the Proper Defendant

Defendant argues that Denty has sued the wrong party. SBC has produced uncontradicted evidence that all the positions Denty sought were with SB plc, the English corporation which is the parent company of the defendant, SBC. Denty argues, however, that SBC has waived this argument by failing to plead it as an affirmative defense. Denty further argues that SBC is estopped from making this argument because, in its answer, SBC in effect admitted that it was the proper defendant. Denty has indicated that if SBC has not waived this argument, or if SBC is not estopped from making it, Denty would seek leave to amend his complaint to add SB plc as a defendant.

Denty's waiver argument is based on his assertion that "the defense that plaintiff has sued the wrong party is an affirmative defense" that is

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[8] According to defendant, four of the five positions were located in England, and the fifth was located in Australia. Plaintiff neither confirms nor denies the locations of these jobs but acknowledges that they all would have been performed outside the United States.

waived if not pled in the answer. Plaintiff's Mem. at 26. Denty bases his estoppel argument primarily on a series of statements in defendant's answer, which acknowledge that following the merger of SmithKline Beckman and the Beecham Group, a reorganization occurred. In the answer, defendant stated that "SmithKline" -- defined earlier in the answer as SBC -- was responsible for the reorganization. According to Denty, the reorganization included filling the positions Denty sought and which he allegedly was denied because of his age. Thus, Denty argues, SBC has admitted that it -- not SB plc -- is the entity that made the allegedly discriminatory decisions. Moreover, Denty further asserts that throughout this litigation, which included proceedings before the Pennsylvania Human Relations Commission, the defendant never distinguished between SBC and SB plc, but instead responded to Denty's allegations as if it were the correct party. Having affirmatively "admitted" that it is the correct party, and having failed to distinguish itself from SB plc, Denty argues, the defendant cannot now assert that SB plc is the proper defendant.

The defenses of estoppel and waiver generally are granted only when prejudice can be shown. Thus, although the defense of failure to sue the proper party is indeed considered to be an affirmative defense which must be pled in the defendant's answer, see Bokunewicz v. Purolator Products, Inc., 907 F.2d 1396, 1402 (3d Cir. 1990), the defense is not waived unless prejudice to the plaintiff can be shown. In Bokunewicz, the Third Circuit stated that "failure to [plead the argument that the defendant was the wrong party] is a waiver of the defense unless leave of court is granted to amend under Fed. R. Civ. P. 15." Id. (quoting and adopting district court opinion) (emphasis added). Under Rule 15, "leave shall be given when justice so requires." Fed. R. Civ. P. 15(a). According to the 1937 Advisory Committee Notes, leave to amend can be granted "when the adverse party has not been misled and prejudiced." See also Wright Miller, Federal Practice Procedure § 1278 ("The substance of many unpleaded affirmative defenses may be asserted by pretrial motions, particularly in the absence of prejudice.") Prejudice similarly is an essential element of estoppel. See Walter v. Netherlands Mead N.V., 514 F.2d 1130, 1140-41 (3d Cir. 1975).

Plaintiff has shown no evidence that he was prejudiced by defendant's alleged failure to alert him to its argument that SBC is not the proper defendant in this case. The only prejudice plaintiff has asserted would arise if the court allows defendant to argue that SB plc is the proper defendant without giving plaintiff the opportunity to add SB plc as a defendant. See Plaintiff's Mem. at 29. This I do not propose to do. Rather, plaintiff should

be given leave to add SB plc as a defendant. Because I conclude below, however, that the ADEA does not apply to the plaintiff's failure-to-promote claim, the formality of an amended complaint will be unnecessary.

III. The Extraterritorial Application of the ADEA

The ADEA makes it "unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." 29 U.S.C. § 623(a). Until 1984, it appeared that the ADEA had no extraterritorial reach. All seven of the federal courts of appeals that examined the ADEA as it stood in 1984 have concluded that it did not protect American citizens working abroad for a foreign subsidiary of an American corporation. See Lopez v. Pan Am World Services, Inc., 813 F.2d 1118 (11th Cir. 1987); S.F. De Yoreo v. Bell Helicopter Textron, Inc., 785 F.2d 1282 (5th Cir. 1986); Ralis v. RFE/RL, Inc., 248 U.S. App. D.C. 208, 770 F.2d 1121 (D.C. Cir. 1985); Pfeiffer v. Wm. Wrigley Junior Co., 755 F.2d 554 (7th Cir. 1985); Zahourek v. Arthur Young Co., 750 F.2d 827 (10th Cir. 1984); Thomas v. Brown & Root, Inc., 745 F.2d 279 (4th Cir. 1984); Cleary v. U.S. Lines, Inc., 728 F.2d 607 (3d Cir. 1984). These courts applied the well-established presumption against extraterritorial application of federal law. See EEOC v. Arabian American Oil Co., 499 U.S. 244, 248, 113 L. Ed. 2d 274, 111 S. Ct. 1227 (1991) ("It is a longstanding principle of American law that 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.'") (quoting Foley Brothers, Inc. v. Filardo, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949)). This presumption reflects the principle of international comity, under which the United States should avoid interference with the laws of another sovereign over conduct occurring within its territory. Before 1984, no extraterritorial application of the ADEA would be read into the statute because it did not explicitly provide that it applied to any conduct outside the boundaries of the United States.

In 1984, Congress amended the ADEA to give it a limited extraterritorial reach. As the Supreme Court stated, "The expressed purpose of these changes was 'to make provisions of the Act apply to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries.'" Arabian, supra, at 259 (quoting S.Rep. No. 467, 98th Cong., 2, reprinted in 1984 U.S.C.C.A.N. 2974, 2975)). This purpose was effected through changes to two provisions. First, Congress amended the definition of

"employee" to provide: "The term 'employee' includes any individual who is a citizen of the United States employed by an employer in a workplace in a foreign country." 29 U.S.C. § 630(f). Second, Congress enacted a new subsection of 29 U.S.C. § 623 -- the primary operative provision of the ADEA, which lists prohibited employer practices. The new subsection provides:

> (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer. Foley Brothers, Inc. v. Filardo, 336 U.S. 281, 285, 93 L. Ed. 680, 69 S. Ct. 575 (1949)). This presumption reflects the principle of international comity, under which the United States should avoid interference with the laws of another sovereign over conduct occurring within its territory. Before 1984, no extraterritorial application of the ADEA would be read into the statute because it did not explicitly provide that it applied to any conduct outside the boundaries of the United States.

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> (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.
>
> (2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.
>
> (3) For the purposes of this subsection the determination of whether an employer controls a corporation shall be based upon the --

(A) interrelation of operations,
(B) common management,
(C) centralized control of labor relations, and
(D) common ownership or financial control,
of the employer and the corporation.

29 U.S.C. § 623(h).[9] Together, the 1984 amendments establish that the ADEA applies abroad only when (1) the employee is an American citizen and (2) the employer is controlled by an American employer.[10] Non-citizens working outside the United States are not protected because they are not considered "employees." And American citizens working abroad for companies not controlled by American companies are not protected because the practices of such companies are not covered by the ADEA.

B. Whether Denty's Claim Invokes the Extraterritorial Application of the ADEA

Defendant argues that the ADEA does not apply to the employment decisions Denty challenges because they all involved positions outside the United States for an English corporation. Denty asserts that the nature of his

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[9] This subsection was originally codified as 29 U.S.C. § 623(g), creating the anomaly of having two sections so designated. This mistake was corrected in a 1986 amendment.

[10] The 1984 amendments also establish that even a covered entity need not comply with the ADEA if to do so would violate the laws of the country in which it operates. 29 U.S.C. § 623(f)(1). Thus, in Mahoney v. RFE/RL, Inc., 310 U.S. App. D.C. 307, 47 F.3d 447 (D.C. Cir. 1995), the court held that an American corporation operating in Germany did not violate the ADEA by terminating an American citizen due to his age, when its labor contract mandated retirement at age sixty-five. Given "the German laws standing behind such contracts," the employer's "obligations under foreign law [would have] collided with its obligations under" the ADEA if the ADEA applied in this situation. 47 F.3d at 450. According to the court, Congress, "quite sensibly" resolved the potential international conflict of laws "by relieving the employer of liability under the Act." Id.

claim is purely domestic -- involving an American citizen working for an American company in the United States. According to Denty, the site of the workplace is the key factor in determining whether a claim exceeds the extraterritorial reach of the ADEA. Denty argues that the relevant work site was SBC's Philadelphia office, where he worked at the time of the alleged discrimination.

The proposition that the site of the workplace determines the application of the ADEA is indeed supported by the cases Denty cites. The courts which denied the extraterritorial application of the pre-1984 ADEA held that it was the place of the plaintiffs' employment that led to the dismissal of their claims. In those cases it did not matter that the plaintiffs worked for American corporations or that the allegedly discriminatory decisions were made in the United States; the ADEA claims failed merely because the site of plaintiff' employment was outside the United States. Thus, in Wolf v. J.I. Case Co., 617 F. Supp. 858 (D. Wisc.), aff'd 772 F.2d 902 (5th Cir. 1985), the court stated:

Regardless whether the plaintiff worked for an American company or its foreign subsidiary, or both, it is his place of employment which governs the applicability of the ADEA. Pfeiffer, supra, 755 F.2d at 559; Cleary, supra, 728 F.2d at 610.

The plaintiff's allegation that he was supervised and controlled by top management of the defendants based in the United States is not of any legal significance so long as the plaintiff performed his work abroad. The plaintiffs in Cleary, Zahourek, and Thomas were all denied the protection of the ADEA despite the fact that they were directly employed by American companies and not by foreign subsidiaries of the companies.

In sum, the court finds that the plaintiff's work station was outside the United States. As a result, the plaintiff['s] termination claim is not cognizable under the ADEA as it existed at the time he was terminated. 617 F. Supp. at 863. Following the passage of the 1984 amendments, the focus on the plaintiff's work site derives directly from the language of the statute: an "employee" is defined to include United States citizens employed "in a workplace in a foreign country." 29 U.S.C. § 630(f).

The proposition that the site of the workplace determines the applicability of the ADEA -- a proposition in which I acquiesce -- does not, however, lead to the conclusion advanced by Denty. The employment decisions at issue here involve Denty's application for positions outside the United States. The relevant work site is the location of these positions, not the location of Denty's employment at the time of the alleged discrimination. In

Lopez, supra, the plaintiff was an American citizen who, while in the United States, applied for work in Venezuela. The Eleventh Circuit held that the ADEA did not protect the plaintiff in this situation because "the work station for appellant's job would have been Caracas, Venezuela." 813 F.2d at 1120 (emphasis added). Here, Denty's workplace would have been England or Australia. The relevant work site in a case of alleged discrimination against a job applicant is the location of the position for which the plaintiff applied. Denty attempts to distinguish Lopez on the ground that it involved an "original application" for employment and not, as in the present case, an application for promotion from within a company. Plaintiff's Mem. at 19 n.13. Nothing in the text of the ADEA, however, supports a distinction between applications for a promotion and applications for a new job.

Denty presents a series of hypotheticals that purportedly demonstrate the absurdity of not applying the ADEA to foreign-based work sites of foreign companies. If the ADEA does not apply, Denty asserts, a foreign company with an office in the United States could lawfully discriminate against its American employees on the basis of age by transferring them to the company's foreign office, where, under the laws of the foreign state, the employees could be dismissed on the basis of age. This hypothetical method of evading the ADEA has already been considered by two courts, which have concluded that the problem can be addressed without redefining the definition of a workplace. In Wolf, the court stated, "An exception is made when it is necessary to prevent a transparent evasion of the Act, as where an employer transfers an employee abroad for a short period of time for the purpose of avoiding the Act's coverage." 617 F. Supp. at 861. Similarly, in Pfeiffer, the Seventh Circuit stated:

All this is not to say, however, that if Pfeiffer had worked for Wrigley in the United States, and Wrigley to get around the Age Discrimination in Employment Act had moved him abroad in his last day (or week, or month -- we need not explore the outer bounds of the limiting principle sketched here) and then fired him, it would be immune from liability under the Act. In that hypothetical case Pfeiffer's relevant work station would be (we may assume, without deciding) the United States. 755 F.2d at 559. Even if these courts are mistaken that such an exception can be read into the statute, the problem is one to be fixed by Congress, which limited the extraterritorial application of the ADEA. In any event, the problem Denty posits is not presented by his case, the ADEA is clear that it does not apply to employment abroad with foreign-controlled employers, and I need not address the hypothetical failings of the statute.

B. Whether SB plc Is Controlled by An American Employer

Because the positions Denty sought were outside the United States, the ADEA only applies if SB plc can be considered to be controlled by an American employer. The ADEA declares that its prohibitions apply when an "employer controls a corporation whose place of incorporation is in a foreign country." 29 U.S.C. § 623(h)(1). Conversely, the ADEA does not apply "where the employer is a foreign person not controlled by an American employer." 29 U.S.C. § 623(h)(2). Denty does not dispute the fact that SB plc was incorporated in England. Nor does Denty dispute the fact that SB plc is the 100% owner of SBC, a fact that makes it extremely difficult to believe that SB plc is controlled by SBC.

Nonetheless, applying the four-factor test established by the ADEA, Denty argues that SB plc and SBC are indistinguishable and should be considered a "single employer." The "single employer" inquiry advocated by Denty is not the correct inquiry in this case. It derives from cases in which courts have considered whether the number of employees of two nominally distinct entities can be aggregated in determining whether a firm employs the minimum number of employees necessary to be covered by the National Labor Relations Act and, by extension, the ADEA. See Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc., 380 U.S. 255, 13 L. Ed. 2d 789, 85 S. Ct. 876 (1965) (applying the single employer theory to a case arising under the NLRA); Rogers v. Sugar Tree Products, Inc., 7 F.3d 577, 582-84 (7th Cir. 1993) (applying the single employer theory to an ADEA case). In this case, the issue is not whether SB plc and SBC should be considered a single employer but whether Denty sought employment with an employer "controlled" by an American firm. Nonetheless, the four-factor test used to determine whether two firms should be considered a single employer is identical to the test specified by the ADEA for "the determination of whether an employer controls a corporation." 29 U.S.C. § 623(h)(3). These factors are "interrelation of operations," "common management," "centralized control of labor relations," and "common ownership or financial control." Id.

Plaintiff has presented substantial evidence as to all these factors. Operations at SB plc and SBC are highly integrated, organized by the type of work performed and not by location; thus, SmithKline Beecham Pharmaceuticals operates as a unified corporate division in England, in the United States, and elsewhere. Deposition testimony further reveals the interrelationship between the two firms in that SBC employees such as Denty

report directly to SB plc employees. Moreover, the two corporations have common management -- one CEO, whose offices are in England. Labor relations are similarly centralized -- directed by a single Director and Vice-President, whose office is also in England. One annual report is prepared for the two entities, in which revenues are reported on a consolidated basis. See Plaintiff's Ex. 21. The annual report speaks of the corporation in singular terms, as an English corporation.

While all of this suggests that SmithKline Beecham's American and English operations overlap to a great extent, it in no way suggests that SB plc is controlled by its American subsidiary. On the contrary, the evidence garnered by Denty leads to the unsurprising conclusion that the American subsidiary is controlled by its English parent. While the two entities have interrelated operations and common management, the common management is focused in England, at the corporation's primary headquarters. There may be central control of the two entities' labor relations, but again control lies in the English entity. Ownership too lies entirely with the English corporation, which wholly owns its American subsidiary.

Denty has produced no evidence to establish a genuine dispute of fact as to the control of SB plc. He can only claim that he applied for positions outside the United States for an English corporation. The ADEA has no application in this situation, and summary judgment is therefore granted to defendant on Denty's failure-to-promote claim.

IV. The Extraterritorial Application of the PHRA

Although the ADEA explicitly provides for a limited any extraterritorial reach, the PHRA makes no provision at all for extraterritorial application. As discussed above, federal courts will only attribute to Congress an intent to apply federal law outside the United States when Congress has very explicitly expressed such an intention. The rationale for this reluctance -- respect for the sovereignty of other nations within their territories -- should make courts even more reluctant to apply state law outside the boundaries of the United States. Great mischief would be accomplished by allowing each state to regulate the conduct of individuals abroad. Without any evidence that Pennsylvania intended to apply the PHRA to decisions by an English corporation regarding positions in England -- and no such evidence has been offered -- this court concludes that the PHRA does not apply to the employment decisions at issue in this case.

Denty has not argued that the PHRA should be applied

extraterritorially. Instead, Denty argues, as discussed above, that his complaint is of a purely domestic nature, in that at the time of the alleged discrimination he was working in the United States for an American employer. As I concluded above, this argument ignores the crucial facts that the positions Denty allegedly was denied on the basis of age were outside the United States, for an English employer. Because the complaint seeks to apply the PHRA extraterritorially, the claim under the PHRA must be dismissed.[11]

Conclusion

As discussed above, Denty's failure-to-promote claims must be dismissed because the ADEA and the PHRA do not cover decisions regarding employment outside the United States for a foreign-run company. An appropriate order dismissing these claims accompanies this memorandum.

ORDER

Upon consideration of the defendant's motion for summary judgment on Counts I and III of the plaintiff's complaint, and pursuant to the attached memorandum, it is hereby ORDERED that the motion is GRANTED. Counts I and III are hereby DISMISSED.

/s/ Pollak, J.

November 6, 1995

---

[11] Pennsylvania choice-of-law rules similarly lead to the conclusion that the conduct of an English corporation in filling positions in England and Australia is not governed by Pennsylvania law. Pennsylvania has adopted choice-of-law principles that it describes as "a flexible rule which permits analysis of the policies and interests underlying a particular issue before the court." Griffith v. United Air Lines, Inc., 416 Pa. 1, 203 A.2d 796, 805 (Pa. 1964). England and Australia clearly have strong interests in regulating the employment relations within their borders. In contrast, Pennsylvania's interest relates only to its interest in protecting American applicants for the positions at issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

GARLAND DENTY	:	
	:	Civil Action
Plaintiff,	:	No. 93-6978
v.	:	
	:	
SMITHKLINE BEECHAM CORP.,	:	
	:	
Defendant.	:	

ORDER

AND NOW this 10 day of May, 1996, upon consideration of Plaintiff's Motion for Certification to Allow an Immediate Appeal Pursuant to 28 U.S.C. § 1292(b), Plaintiff's Motion for Certification which defendant does not oppose (see Stipulation of March 29, 1996) is hereby GRANTED and the Order of November 6, 1995 is hereby CERTIFIED to the Court of Appeals as involving a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Order may materially advance the ultimate termination of the litigation, and therefore appropriate for immediate review pursuant to 28 U.S.C. § 1292(b).

The question to be certified is whether the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act are applicable

to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, PA, in the employ of a foreign corporation not controlled by an American corporation, where the promotional opportunity is a position with the same foreign corporation outside the United States?

/s/ Louis H. Pollak
Louis H. Pollak

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

June 3, 1996
A-123

No. 96-8030

GARLAND DENTY, Petitioner
v.
SMITHKLINE BEECHAM CORPORATION
(E.D. of Pa. Civil No. 93-cv-06978 (LHP))

Present: Becker, Roth and Sarokin, Circuit Judges.

1. Petition for permission to appeal under 28 U.S.C. Section 1292(b).

2. Response by Respondent to the Petition for permission to appeal.

/s/ Anthony Infante
Anthony Infante 597-3137
Deputy Clerk

ORDER

The foregoing petition is granted. The question accepted for certification is the following:

Whether the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act are applicable to the denial of a promotional opportunity based upon age to an individual working in Philadelphia, PA, in the employ of a United States subsidiary controlled by a foreign parent corporation not itself controlled by an American corporation, where the

promotional opportunity is a position with the foreign corporation outside the United States.

Dated: June 21, 1996

By the Court,

LD/cc: Ronald H. Surkin, Esq.
Alexander A. DiSanti, Esq.
Nancy C. DeMis, Esq.
L. Keith Lipman, Esq.
Steven B. Fierson, Esq.

_____

Circuit Judge

Supreme Court, U.S.
FILED
JUL 18 1997
CLERK

No. 96-1994

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

GARLAND DENTY,
Petitioner,

v.

SMITHKLINE BEECHAM CORPORATION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTION PRESENTED FOR REVIEW

Whether the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act may be extended extraterritorially to apply to the filing by a United Kingdom corporation, not controlled by an American corporation, of job openings in the United Kingdom and Australia.

RULE 29.6 LISTING

SmithKline Beecham Corporation ("SBC"), the respondent herein, is wholly owned by SmithKline Beecham plc ("SB plc"), a corporation organized under the laws of the United Kingdom of Great Britain.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

No. 96-1994

GARLAND DENTY,

Petitioner,

v.

SMITHKLINE BEECHAM CORPORATION,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The unanimous March 17, 1997 opinion of the United States Court of Appeals for the Third Circuit affirming the District Court's grant of summary judgment in favor of SmithKline Beecham Corporation, is reported as *Denty v. SmithKline Beecham Corporation,* 109 F.3d 147 (3d Cir. 1997). The opinion of the District Court for the Eastern District of Pennsylvania, the Honorable Louis H. Pollak, granting summary judgment in favor of SmithKline Beecham Corporation, is reported as *Denty v. SmithKline Beecham Corporation,* 907 F. Supp. 879 (E.D. Pa. 1995). Both opinions are included in the Appendix to the Petition for Writ of Certiorari.

STATUTES INVOLVED IN THE CASE

In concluding that the Age Discrimination in Employment Act (the "ADEA"), 29 U.S.C. § 621 *et seq.*, did not

apply to regulate an independent foreign company acting outside of the United States to fill its own jobs also located outside of the United States, the Circuit and District courts relied upon the ADEA's statutory exemption, 29 U.S.C. § 623(h)(2), for foreign corporations not controlled by American employers. The exemption reads as follows:

> **Practices of foreign corporations controlled by American employers; foreign persons not controlled by American employers; factors determining control**
>
> (1) If an employer controls a corporation whose place of incorporation is in a foreign country, any practice by such corporation prohibited under this section shall be presumed to be such practice by such employer.
>
> **(2) The prohibitions of this section shall not apply where the employer is a foreign person not controlled by an American employer.**
>
> (3) For the purpose of this subsection the determination of whether an employer controls a corporation shall be based upon the
>
> (a) interrelation of operations,
>
> (b) common management,
>
> (c) centralized control of labor relations, and
>
> (d) common ownership or financial control,
>
> of the employer and the corporation.

29 U.S.C. § 623(h) (emphasis added).

STATEMENT OF THE CASE

The full facts, as well as the statutory scheme, governing this case are set forth in the opinion of the Third Circuit and the District Court. Pet. App. 1-20. What follows is a summary of those matters.

1. *Facts.* On April 11, 1989, SmithKline Beckman Corporation, a Pennsylvania corporation, and Beecham

Group plc, a company incorporated under the laws of the United Kingdom, merged. The entity resulting from this merger was SB plc, a corporation also organized under the laws of the United Kingdom. The corporate headquarters of SB plc was in Brentford, England and its shares were publicly traded on the London stock exchange. SB plc became the 100% owner of the common stock of SBC, its United States subsidiary.

At all relevant times, petitioner worked in Philadelphia for SBC, SB plc's U.S. subsidiary. At no time was petitioner ever employed by SB plc. There is no dispute that SBC was controlled by SB plc, i.e., the foreign parent controlled the American subsidiary.

Petitioner claims that he should have received four jobs with his employer's foreign parent, SB plc, during July 1992. Three of the four positions which petitioner claimed should have been his were located in the United Kingdom. The fourth position was located in Australia. It is undisputed that an SB plc executive made the selection decisions during a selection process conducted in the United Kingdom and that all the positions in question were with the foreign parent, SB plc.

2. *Opinions Below.*

Based on these facts, the District Court, The Honorable Louis H. Pollak, granted summary judgment to SBC. The District Court found that in 1984, Congress, in response to a series of unanimous holdings from seven circuit courts that the ADEA did not apply at all abroad, amended the Act to give it, for the first time, a "limited extraterritorial reach" in order to allow it to reach conduct abroad by American corporations and American controlled corporations. Pet. App. at 13. Congress at the same time added a new subsection of 29 U.S.C. § 623—"the primary operative provision of the ADEA, which lists prohibited employer practices." Pet. App. at 14. This new subsection exempted from the prohibitions of the

ADEA all "foreign person[s] not controlled by an American employer." 29 U.S.C. § 623(h)(2).

Applying this statutory language of the ADEA, the District Court first addressed petitioner's argument that his claim that he should have been sent abroad to work for the foreign parent company did not involve an extraterritorial application of the ADEA and did not invoke the foreign corporation exemption set forth in § 623 (h)(2). The District Court rejected this claim stating that petitioner's argument that he was not seeking an extraterritorial application of law "ignores the crucial facts that the positions Dentry allegedly was denied on the basis of age were outside the United States, for an English employer." Pet. App. at 20.[1]

The District Court also found that while petitioner "argue[d] that SB plc and SBC are indistinguishable and should be considered a 'single employer,'" the "'single employer' inquiry advocated by Denty is not the correct inquiry in this case." Pet. App. at 18. Under the ADEA's 1984 amendments the "issue is not whether SB plc and SBC should be considered a single employer but whether Denty sought employment with an employer 'controlled' by an American firm." Pet. App. at 18. And on this determinative issue of "control," the District Court found that all of the "evidence garnered by Denty leads to the unsurprising conclusion that the American subsidiary is controlled by its English parent." Pet. App. at 19. This conclusion has never been challenged by petitioner. Ac-

---

[1] The District Court also rejected petitioner's assertion that in cases arising from denial of job applications to jobs for foreign companies in foreign lands, courts should apply two different rules of extraterritorial application depending on whether the denial of the job application is characterized as a "failure to promote" or a "failure to hire." The District Court rejected this supposed distinction because "nothing in the text of the ADEA . . . supports a distinction between applications for a promotion and applications for a new job." Pet. App. at 17.

cordingly, the District Court concluded that petitioner "can only claim that he applied for positions outside the United States for an English corporation," and thus "[t]he ADEA has no application in this situation." Pet. App. at 19.

The United States Court of Appeals for the Third Circuit unanimously affirmed the grant of summary judgment for SBC. The Third Circuit agreed with the District Court's finding that Congress when it enacted the foreign corporation exemption in § 623(h)(2), "the key provision in this case," provided for a "limited extraterritorial application" of the ADEA to *American* owned or controlled companies abroad. Pet. App. at 6. The Third Circuit's "reading of the plain language of the statute compel[led] [it] to agree," with the District Court's conclusion that the ADEA did not apply extraterritorially unless the foreign employer is controlled by an American employer. Pet. App. at 7. And, because "SB plc controls the American subsidiary, not the other way around . . . the ADEA cannot be applied extraterritorially to create liability on the part of SB plc given the facts of this case."[2] Pet. App. at 8.

The Third Circuit concluded that the Congress' policy decision to exempt all independent foreign corporations from the extraterritorial reach of the ADEA could not have been "more clear." Pet. App. at 9. Because "the ADEA does not apply where a foreign corporation controls an American corporation and the employment is with the foreign person abroad," the Third Circuit "affirm[ed] the judgment of the District Court." Pet. App. at 9.

---

[2] The Third Circuit also rejected petitioner's claim that the ADEA distinguished in its extraterritorial application between "new hire" and "promotion" claims—"the language of the ADEA does not distinguish between failure to hire and failure to promote situations." Pet. App. at 7 n.5.

SUMMARY OF ARGUMENT

Certiorari should be denied for all the following reasons:

1. *The Decision Below Does Not Conflict With Any Other Circuit Court Decision on the Question Presented.* The petitioner admits that the decision below is one of first impression. *See* Petition for Certiorari at 10 ("Neither this Court nor any other Court of Appeals has addressed" the "question" presented by petitioner). And, in fact, it is true that no other federal or state court has considered the issue framed by petitioner. *Infra* at p. 7.

2. *The Question Presented Is Relatively Unimportant and Unlikely To Recur Frequently.* The issue of whether the ADEA applies overseas to a foreign company not controlled by an American employer when that company fills overseas jobs is not likely to arise frequently. The absence, from the enactment of the ADEA in 1967 to the present day, of any other case addressing the question presented here, establishes that the petitioner's claim is novel and that there is not now, nor is there likely to be in the future, a ground swell of claims being made against foreign parent companies because of how they filled their own overseas job openings. *Infra* at p. 8.

3. *The Question Presented Merely Raises An Issue of Statutory Application, Not Interpretation.* Certiorari should also be denied because the Petition's *sole* argument is that the ADEA's express exemption for foreign employers should not apply under the particular facts of this case. This is *not* an argument of statutory interpretation. It is, at best for petitioner, only an argument about whether a properly stated rule of law should apply to the unique set of facts presented here. *Infra* at p. 9.

4. *The Application Urged by Petitioner Poses Complex and Unique Factual Issues.* The Petition is premised on the assumption that it would be appropriate on the record of this case to disregard the corporate forms of

a foreign parent company and its United States subsidiary, and that the ADEA should, as a result, be applied extraterritorially to the foreign parent. Putting to one side the point that even if that factual assumption were true the petitioner still would not prevail, the courts below did not make any factual findings about piercing the corporate veil of any company, and this Court does not sit to sift through these types of complicated factual issues. *Infra* at p. 10.

5. *Petitioner's Argument Here Was Never Raised Below.* The petitioner neither alleged in his Complaint nor argued to the Court of Appeals that there should be a piercing of corporate veils in this case. Because the Petition is based on an argument neither raised nor decided below, it should be rejected. *Infra* at p. 11.

6. *The Application of the Statutory Exemption by the Courts Below Was Correct.* Finally, the petitioner's argument that the statutory exemption for foreign employers is "not relevant" (Petition at 3) to this case was correctly rejected by the courts below. The ADEA's statutory exemption for foreign employers was enacted by Congress in 1984 when Congress amended the ADEA to give it a limited extraterritorial reach. At that time, Congress exempted from all extraterritorial applications of the ADEA foreign firms, like SB plc, that "were not controlled by an American employer." 29 U.S.C. § 623(h)(2). Because petitioner sought to apply the ADEA to a foreign parent company for its foreign decisions about foreign workplaces, the statutory exemption for foreign employers applied and barred petitioner's claims. *Infra* at p. 12.

REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW DOES NOT CONFLICT WITH ANY OTHER CIRCUIT COURT DECISION.

Certiorari should be denied because the decision below does not conflict with any holding from any other court. No other federal or state court in this country has con-

sidered whether, where the ADEA expressly exempts independent foreign companies from any and all extraterritorial applications of the Act, a claim may nevertheless be brought against a foreign company for its decisions abroad about filling its own jobs overseas. Petitioner admits as much. *See* Petition for Certiorari at 10 ("Neither this Court nor any other Court of Appeals has addressed" the "question" presented by the petitioner). Because the decision of the Third Circuit is one of first impression, the Petition for a Writ of Certiorari should be denied. *See* Sup. Ct. R. 10.1(a) (important consideration for certiorari is whether the court below has "rendered a decision in conflict with the decision" of another court of appeals or the highest court of a state on the same matter).

II. THIS ISSUE IS UNLIKELY TO ARISE FREQUENTLY, AND SO THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION FOR THIS COURT TO RESOLVE.

Petitioner cannot name one *litigant* who has ever argued that the ADEA has the reach he claims, much less one court. The reason for this lack of authority, presumably, is that other potential plaintiffs, if any, have recognized the obvious fallacy of the notion that the ADEA may be used to punish a foreign company, not controlled by an American employer, acting outside of the United States to fill foreign jobs. *See* 29 U.S.C. § 623(h)(2) ("The prohibitions of this subsection *shall not apply* where the employer is a foreign person not controlled by an American employer") (emphasis added).

There is just no reason to believe that numerous Americans, employed by American subsidiaries, are rushing to sue foreign parent companies because the foreign companies did not select them for jobs on foreign shores. To the contrary, the complete absence of any other case addressing this issue in the thirteen years after the enact-

ment of the 1984 amendments giving the ADEA limited extraterritorial reach, establishes that claims like petitioner's, which so clearly fly in the face of the statutory language, will be rare indeed. Since the claim made here has not and will not arise with any frequency, certiorari should be denied. *See Rice v. Sioux City Cemetery*, 349 U.S. 70, 74 (1955) (issue must be "beyond the academic or the episodic" to warrant a grant of certiorari).[3]

III. THE PETITION RAISES ONLY A QUESTION OF APPLICATION OF LAW TO FACT.

Certiorari should also be denied because the Petition does not raise any important questions of statutory interpretation. The Petition's *sole* argument is that the exemption for independent foreign companies enacted by Congress in 1984 is "not relevant" in the particular factual matrix presented by this case. Petition at 3. Thus, the petitioner has never urged any interpretation of the statutory exemption other than the one which is obvious from the face of the satute. Consistent with this view, the lower courts merely found that the foreign corporation exemption *applied* to this case. Accordingly, this case, at best for petitioner, merely raises a question of application of law to a particular set of facts—it does not raise a pressing question of statutory interpretation needing clarification by this Court. *See* Sup. Ct. R. 10.1 (Petition is "rarely granted" when the "asserted error" is the "misapplication of a properly stated rule of law").

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[3] Petitioner asserts that the Third Circuit's decision will also have implications for claims arising under Title VII of the 1964 Civil Rights Act. 42 U.S.C. § 2000e *et seq.* But petitioner cites to no decisions in the thirty-three year history of that Act where a court considered whether Title VII applied to a foreign company deciding in a foreign country how to fill foreign job openings.

IV. THIS COURT WOULD BE REQUIRED TO MAKE COMPLICATED FACTUAL FINDINGS IF IT GRANTED THE PETITION FOR CERTIORARI.

The Petition for Certiorari ignores the "control" test that Congress mandated be used, and that the courts below applied, to determine whether the ADEA applied abroad to a foreign company. Instead, the Petition claims that a different, non-statutory, "piercing the corporate veil" test should be utilized to disregard the corporate forms of SB plc and SBC. Utilizing this "piercing" assumption, petitioner argues that because there are alleged interrelation of operations between SBC, his employer, and SB plc, the foreign parent company that made the selection decisions at issue, the corporate forms of these companies could be disregarded and the foreign SB plc deemed his employer. Only by making this assumption can petitioner posit that his claim is one arising out of the denial of a "promotion" rather than the denial of his application for "new hire." This distinction is critical to petitioner because even he is forced to admit that if his job application to SB plc is considered to be a "new hire" job application, he loses. *See* Petition at 15-16.

Thus, not only does petitioner's argument disregard the "control" test that Congress in 1984 explicitly directed be utilized to determine whether the ADEA applies to a foreign company overseas, it also raises the difficult factual question, not addressed below, of whether it is appropriate under this record to "pierce" the corporate form of a foreign parent company and its United States subsidiary. Because this Court does not sit to resolve these types of factual disputes, certiorari should be denied. *See e.g., NLRB v. Hendricks County Rural Electric Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented primarily a question of fact that did "not merit Court review").

V. THE PETITION IS BASED ON ARGUMENTS NOT RAISED BELOW.

Petitioner did not allege in his Complaint nor assert in the Third Circuit that the corporate forms of SB plc and SBC should be pierced so that he could be deemed to be an employee of SB plc. The courts below did not, therefore, examine the facts in the record to determine whether it would be appropriate to disregard the corporate form of any company. There is simply no reason why review should be granted to a case where the Court will be required to comb through the factual record to attempt to resolve factual issues that were not raised below.

The courts below also did not address the legal issues raised by the Petition's assumption that the corporate veil of a foreign parent company, not incorporated in the United States, should be disregarded by a United States court. These issues include (1) whether United States or United Kingdom law would apply to determine whether the corporate form of a U.K. firm could be disregarded and (2) under whichever law applied, would it be permissible under the ADEA and principles or international comity to disregard the corporate form of an independent foreign company because it allegedly has some overlapping operations with its U.S. subsidiary. *See e.g., EEOC v. Arabian American Oil,* 499 U.S. 244, 255 (1991) (applying United States employment law to "foreign corporations operating in foreign commerce" raises "difficult issues of international law" because it imposes "this country's employment-discrimination regime upon foreign corporations"). None of these critical and difficult issues were raised or decided below. In fact, they are not even addressed in the Petition.

Hence, certiorari should also be denied because the Petition is based on assumptions, both factual and legal, which were neither raised nor addressed below. *See e.g., Davis v. United States,* 110 S. Ct. 2014, 2024 (1990) (Court would "decline to address" argument "neither raised before nor decided by the Court of Appeals"); *see*

also 17 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure*, § 4036, at 38-39 (2d ed. 1988 & Supp. 1991) (Court reluctant to consider an issue not addressed by the court of appeals, even if properly raised, because it would lose "the advantage of prior appellate scrutiny of the record and deliberation of the arguments").

VI. THE APPLICATION OF SECTION 623(H)(2) IS IN ACCORD WITH PRECEDENT FROM THIS COURT AND WAS OBVIOUSLY CORRECT.

A. Congress in 1984 Exempted Foreign Corporations Not Controlled by an American Corporation From all Extraterritorial Applications of the ADEA.

Prior to 1984 all of the circuit courts that had considered the question held that the ADEA did not reach beyond the territory of the United States.[4] These courts relied upon the "longstanding principle of American law" that " 'legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States.' " *EEOC v. Arabian American Oil Co.*, 499 U.S. at 248 (quoting *Foley Brothers, Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). The presumption "reflects the principle of international comity, under which the United States should avoid interference with the laws of another sovereign over conduct occurring within its territory." Pet. App. at 13.

In 1984 Congress responded by amending the ADEA "to give it a limited extraterritorial reach." Pet. App. at 13. Congress amended the ADEA by adding a new subsection, 29 U.S.C. § 623(h), the first clause of which provides that where a United States employer "*controls* a corporation whose place of incorporation is in a foreign country, any practice by such corporation shall be presumed to be such practice by" the U.S. employer. 29 U.S.C. § 623(h)(1) (emphasis added). But, if the for-

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[4] *See e.g., Cleary v. United States Lines, Inc.*, 728 F.2d 607 (3d Cir. 1984); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984), *Thomas v. Brown & Root, Inc.*, 754 F.2d 279 (4th Cir. 1984).

eign corporation is "*not controlled* by an American employer," then the "prohibitions of this section shall not apply." 29 U.S.C. § 623(h)(2) (emphasis added).

The effect of these amendments was to exempt foreign corporations from any extraterritorial application of the ADEA unless they are "controlled" by an American parent.[5] *See e.g., Arabian American Oil*, 499 U.S. at 259 (ADEA's 1984 amendments provide that it will apply overseas only " 'to citizens of the United States employed in foreign countries by U.S. corporations or their subsidiaries' ") (quoting S. Rep. No. 98-467, 98th Cong., 2d Sess. 27-28 (1984) *reprinted in* 1984 U.S.C.C.A.N. *Older Americans Act Amendments of 1984*, 2974, 2975)). Hence, the courts below properly applied the § 623(h)(2) exemption to SB plc, a foreign parent company "not controlled by an American employer," for its overseas decisions about its own foreign jobs.

B. The Workplace Test Was Created To Further the Principle Against the Extraterritorial Application of Federal Law; Petitioner's Rule Would Do Just the Opposite.

To prop up his argument that the 1984 amendments to the ADEA are "not relevant," petitioner cites (Petition at 14) to the "workplace" test adopted by courts which

---

[5] The legislative history of the 1984 amendemnts, as the courts below found, confirms that Congress limited the extraterritorial application of the ADEA to American controlled companies *only*, because Congress recognized that delicate issues of international relations were involved in extending the ADEA to other countries' territory. Congress wanted any such extension of the Act to be as inoffensive as possible and to tread as lightly as possible on the sovereignty of other nations. Thus, Congress sought to respect "the well established principle of sovereignty, that no nation has the right to impose its labor standards on another country." S. Rep. No. 98-467, 98th Cong., 2d Sess. 27-28 (1984). To achieve this result, Congress *explicitly excluded* from the extraterritorial reach of the ADEA all foreign companies that were not controlled by American employers.

had interpreted the ADEA prior to its amendment in 1984. In those cases, the courts determined that the ADEA prior to its amendment had no effect *at all* abroad, even where the relevant overseas workplaces were for *American* employers. Petitioner argues that the applicable law in cases, such as his, against a *foreign* employer should be determined by the location of the "workplace" of the applicant. But, petitioner ignores the history and the purpose of the "workplace" test, both of which establish that this test was simply a tool utilized by Congress and the courts to *further* the well-established principle *against* the application of U.S. law abroad. Petitioner attempts to use the test to eviscerate its very purpose.

The use of the "workplace" test to determine whether U.S. laws applied outside the United States, originated in Congress's response to this Court's decision in *Vermilya-Brown Co., Inc. v. Connel*, 335 U.S. 377 (1948), which gave the Fair Labor Standards Act (the "FLSA") a "very modest extraterritorial reach." *Pfeiffer v. Wm. Wrigley Jr. Co.*, 755 F.2d 554, 558-59 (7th Cir. 1985). Congress responded to *Vermilya-Brown* by amending the statute to include a specific directive *against* its application abroad. Overseas Labor Standards Amendments, Pub. L. No. 85-231, § 1(1), 71 Stat. 514 (1957). The Senate Report accompanying the amendment explained that although the Court's decision was limited to "the Fair Labor Standards Act, [it] tend[ed] to raise difficult issues of sovereignty and offends the political sensitivities of the foreign governments concerned." S. Rep. No. 987, 85th Cong., 1st Sess., *reprinted in* 1957 U.S.C.C.A.N. *Fair Labor Standards Act—Overseas Area*, 1756, 1757. The FLSA was, therefore, amended to *explicitly prevent* "the application of the Act to geographic areas within a foreign country." S. Rep. No. 987, 85th Cong., 1st Sess., *supra* at 1758. Congress achieved this result by adding section 13(f) to the FLSA, which provides that the Act would not "apply with respect to any employee whose services during the workweek are performed in a workplace within a foreign country. . . ." 29 U.S.C. § 213(f).

More than twenty-five years later, the circuit courts concluded that because the ADEA incorporated § 13(f) of the FLSA, the ADEA had no application to "workplaces" abroad and dismissed ADEA claims that arose out of the decisions about the foreign "workplaces" of *American* companies. *See Lopez v. Pan Am World Services, Inc.*, 813 F.2d 1118 (11th Cir. 1987) (dismissing claim arising out of application for job in Venezuela); *S.F. DeYoreo v. Bell Helicopter Textron, Inc.*, 785 F.2d 1282 (5th Cir. 1985) (dismissing claim arising out of termination from job in Canada); *Ralis v. RFE/RL, Inc.*, 770 F.2d 1121 (D.C. Cir. 1985) (involuntary retirement from job in France); *Pfeiffer*, 755 F.2d 554 (7th Cir. 1985) (termination from job in Germany); *Zahourek v. Arthur Young & Co.*, 750 F.2d 827 (10th Cir. 1984) (Honduras), *Thomas v. Brown & Root, Inc.*, 745 F.2d 279 (4th Cir. 1984) (Rotterdam); *Cleary v. United States Lines*, 728 F.2d 607 (3d Cir. 1984) (England).

The rules against extraterritorial application followed in these pre-1984 amendment cases furthered the intent of Congress as originally expressed when it first formulated the "workplace" test, which was to prevent the "application of the Act to geographic areas within a foreign country." S. Rep. No. 987, 85th Cong., 1st Sess., *supra*. Petitioner, on the other hand, seeks to use the test not to further its original purpose, but to accomplish exactly what it was created to prevent—the application of law to "geographic areas within a foreign country."[6]

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[6] While admitting that no other court in this country has disagreed with the Third Circuit's narrow holding below that the ADEA does not apply to an independent foreign company deciding overseas how to fill foreign jobs, Petitioner claims that the "logic" of the Third Circuit's decision "conflicts" with three decisions, none of which were issued in the past decade. *See* Petition at 13-16 (citing *Hishon v. King & Spalding*, 467 U.S. 69 (1984); *Lopez v. Pan Am World Services*, 813 F.2d 1118 (11th Cir. 1987); and

C. The ADEA Does Not Provide for Different Extraterritorial Rules in Cases of Promotion" Than in Cases of "New Hire."

Petitioner also argues that since he alleges that his claim is one for failure to "promote" rather than for failure to hire, he is entitled to some sort of protection

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Zahourek v. Arthur Young & Co., 750 F.2d 827 (10th Cir. 1984)). In fact, the Third Circuit's decision does not conflict with the "logic" of any of the three opinions which petitioner cites.

First of all, none of the three decisions cited by petitoner involve claims against a foreign company for its decisions overseas about foreign jobs, and none of the cases cited by petitioner interpreted the 1984 amendments to the ADEA. To the contrary, *Lopez* and *Zahourek* were both decided before the 1984 amendments and held, in agreement with every other circuit that considered the question, that the ADEA prior to its amendment in 1984 had no extraterritorial effect whatsoever even to *American* firms. *Hishon* is even further removed from being pertinent to this case since it had nothing whatsoever to do with the extraterritorial reach of any federal statute. Rather, that decision dealt with the applicability of Title VII to law firm partnership decisions. Petitioner's claim here, however, is against a U.K. company for its decisions in the U.K. about filling foreign jobs, a claim the lower courts found invalid under the express terms of the 1984 amendments.

Moreover, to the extent that the "workplace" test utilized in *Lopez* and *Zahourek* in those pre-1984 amendment cases continue to have relevance to post-1984 cases such as this—an issue not addresed by Petitioner's brief—they clearly support the decisions below. For example, in *Lopez v. Pan Am World Services, Inc.*, a case the Third Circuit found to be "indistinguishable" from the facts here, Pet. App. at 7 n.5, the court used the workplace test where the plaintiff applied *in the United States* for a job in Venezuela with Pam Am, a *United States* corporation. The Eleventh Circuit dismissed Lopez' claim because "the work station for appellant's job *would have been* Caracas, Venezuela. Therefore, the ADEA, prior to its amendment in 1984, does not protect [Lopez] from age discrimination." *Id.* at 1120 (emphasis added). The courts below agreed with the reasoning of the *Lopez* court and found that the relevant "workplace" when a plaintiff claims that he should have received a job abroad is the geographic area where the work was to be performed. *See* Petition at 17 ("Petitioner's workplace *would have been* England or Australia. The relevant work site in a case of alleged discrimination against a job applicant is the location of

not afforded to unsuccessful "original applicants." Thus, for example, petitioner attempts to distinguish the *Lopez* decision by claiming that it has no application to him since that was an "original application" case. Petition at 15-16.

In essence then, petitioner admits that if a colleague of his who had a "workplace" with another Pharmaceutical company in Philadelphia in 1992 had applied for the identical jobs in the United Kingdom for SB plc, that individual's application would not be covered by the ADEA, but contends that his application should be treated differently because his was not an "original" application for the jobs. Hence, it is ironic that what the petitioner argues for here is a discriminatory rule. A rule which would protect those individuals seeking a promotion but not those seeking a new job. Such a result would be startling given that § 4(a)(1) of the ADEA, the primary operative provision setting forth unlawful employment practices, makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or to otherwise discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment." 29 U.S.C. § 623(a). Hence,

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the position for which the plaintiff applied") (D. Ct.) (emphasis in original); *see also* Pet. App. at 7 n.5 (same) (3d Cir.). *Lopez* does not conflict with the "logic" of the courts below, as Petitioner claims, it wholly supports their findings.

Similarly, in *Zahourek v. Arthur Young & Co.*, 750 F.2d 827, 828 (10th Cir. 1984), the "principal issue," as stated in the first paragraph of that decision, was whether the ADEA applied "to the termination of employment of an American citizen by an American employer where the place of employment is in a foreign country." "The District Court held that the Act did not so apply. We agree." *Id. Zahourek*, therefore, merely held that the ADEA, prior to its amendment in 1984, did not apply extraterritorially to a foreign workplace of an *American* employer—it did not suggest much less hold that the ADEA after its amendment in 1984 would apply extraterritorially to punish a foreign company for its overseas decisions about foreign jobs.

Congress listed "refusal to hire" as the very first proscribed employment practice, which certainly suggests that discriminatory hiring practices were, if not of primary concern to Congress, certainly entitled to protection at least equal to that involving refusals to "promote," a practice not mentioned at all.

Not surprisingly, both the Third Circuit and the District Court wasted no time dismissing this *ad hoc*, results oriented argument in one sentence. *See* Pet. App. at 7 n.5 ("[T]he ADEA does not distinguish between failure to hire and failure to promote situations") (3d Cir.); Pet. App. at 17 ("Nothing in the text of the ADEA" supports a "distinction between applications for a promotion and applications for a new job"). The bottom line is that petitioner is forced into making such obviously tortured arguments because the statutory exemption is so clearly applicable to this case. The simple fact is that the ADEA states that it "shall not apply" overseas to a foreign company unless that company is "controlled" by a United States entity. 29 U.S.C. § 623(h)(2). And, it is undisputed that SB plc is not "controlled" by any such entity.

The only case cited by petitioner to support the allegation that the ADEA exempts foreign companies when they are making "hiring" decisions about foreign jobs but uses a different rule when the job selection decision is semantically labeled a "promotion," is *Hishon v. King and Spalding, supra.* But, the ADEA's express statutory exemption for independent foreign companies was not at issue in *Hishon*, and was not interpreted by this Court in *Hishon*, because the claim in that case was only that a United States employer acting within the United States had discriminated when making decisions about United States positions. Here, the statutory exemption for foreign employers was the "key provision" of the case, Pet. App. at 6, because petitioner's claim was that a U.K. company deciding in the U.K. how to fill U.K. jobs, should be sanctioned under the ADEA because it did not

select him to work in the U.K. Thus, nothing in *Hishon* even remotely suggested that when a job application claim is made against a foreign company for its overseas decisions about foreign jobs, the exemption for foreign companies may become "not relevant" (Pet. at 3) depending on how the application claim is characterized. Petitioner's arguments about *Hishon* were so far and so wide of any mark, that the Third Circuit was amply justified in not explaining why they were wrong.

CONCLUSION

Petitioner attempted to set forth a novel claim against a foreign company for its foreign decisions about foreign workplaces and, not surprisingly, lost. For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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NO. 96-1994

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1997

GARLAND DENTY,
PETITIONER,

V.

SMITHKLINE BEECHAM CORPORATION,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR PETITIONER

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JULY 30, 1997

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REPLY BRIEF FOR PETITIONER

I. THE GRANT OF THIS PETITION FOR CERTIORARI WILL NOT REQUIRE THIS COURT TO MAKE ANY FACTUAL DETERMINATIONS.

Procedurally, if certiorari is granted, this case will involve review of an interlocutory order entering partial summary judgment in favor of the defendant/respondent. No factual determinations will have to be made, complex or otherwise, because there was ample evidence on the record to take to the jury the issue of whether SB plc and SB Corp were a single employer, and therefore that the employment decision to be reviewed could be looked at as a denial of promotion rather than a failure to hire. Indeed, the question certified for review - by stipulation of the parties with the approval of the District Court[1] and thereafter the Court of Appeals - states the relevant factual assumptions on which both lower courts based their determination:

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[1] See, Order of May 10, 1996 Granting Plaintiff's Motion for Certification, Pet. App. at 21

> Are the Age Discrimination in Employment Act and the Pennsylvania Human Relations Act applicable to the **denial of a promotional opportunity** based upon age to an individual working in Philadelphia, Pennsylvania, in the employ of a **United States subsidiary controlled by a foreign parent** corporation not itself controlled by an American corporation, **where the promotional opportunity is a position with the foreign corporation outside the United States?**

Thus, Respondent is simply incorrect in stating that the Petitioner asks the Court to pierce a corporate veil or to make any other factual determinations. Petitioner is not asking this Court to determine whether he can prove the facts necessary to prevail at trial, but rather seeks review of the lower Courts' holding that he can not prevail as a matter of law, even if the jury finds the facts in his favor. It is Respondent who now improperly attempts to raise factual issues by arguing that the opportunity at issue was a "hiring" rather than a "promotion." This appears most obviously on the very first page of Respondent's Brief in Opposition, where it has ignored the stipulated and court-approved issue certified for appeal, and has

instead impermissibly restated the Question Presented for Review more to its liking.

II. EACH OF THE ARGUMENTS STATED IN THE PETITION WAS FULLY BRIEFED BEFORE THE LOWER COURTS.

Respondent's claim that the Petition is based on arguments not raised below is grounded on *Respondent's assertion* that Petitioner is asking the Court to pierce a corporate veil, which is in turn based upon *Respondent's* desire to re-characterize the factual premise on which both lower courts based their determination from the denial of a promotion to a refusal to hire. To the extent that there are factual disputes which may affect the outcome of a trial of Petitioner's claims, they are appropriately reserved for trial. Here, where the factual assumptions on which the lower courts based their decisions are clear, Petitioner properly asks this Court to determine whether the rule of law announced by the lower courts - which denies the protection of American laws prohibiting discrimination in the terms and conditions of employment of an individual employed

within the territorial United States - is correct.

Quite simply, every one of the points raised in the Petition was properly raised below.

III. PETITIONER DOES NOT SEEK TO APPLY UNITED STATES LAW ABROAD; HE SEEKS THE PROTECTION OF UNITED STATES LAW GUARANTEEING EQUALITY IN THE TERMS, CONDITIONS AND PRIVILEGES OF HIS EMPLOYMENT IN THE UNITED STATES

The issue raised in this Petition is not whether the ADEA's extraterritorial reach encompasses the foreign acts of a foreign employer, as Respondent states. Rather, the issue is whether there is any basis in the ADEA on which to deny its protection to an individual employed in the United States

Respondent argues that a foreign employer may discriminate in the terms, conditions and privileges of Petitioner's employment because the decision in issue - promotion to an overseas post - would place the employee beyond the reach of United States law. In making this argument, Respondent asserts that the courts below were

correct in concluding that the ADEA does not distinguish between failure to hire and failure to promoted situations. Both of these arguments were explicitly rejected by this Court in *Hishon v. King & Spaulding*, 467 U. S. 69, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984). This Court stated that the right to fair consideration for promotion to partnership was a privilege of plaintiff's *present* status as an employee, and that in her *current* status as an employee she was entitled to equal employment opportunity.

Respondent also argues that the 1984 Amendments to the ADEA should now be interpreted by this Court as a limitation upon the reach of that statute. The 1984 amendments were enacted to expand, not contract, the scope of the ADEA by assuring that American citizens employed overseas by American employers, or by foreign entities controlled by American employers, would not be any less protected than if they worked in the United States. Respondent's argument would turn those amendments on their head. Congress intended

to strengthen protections afforded to our citizens employed overseas; it did nothing to undermine the protections already afforded to those employed within the United States

IV. CONCLUSION

Any resolution of the issues presented in this Petition for Writ of Certiorari will inevitably ripple across our borders - either by telling foreign employers that the decision whether to promote one of their United States employees to an overseas post is immune from scrutiny under the ADEA, or placing foreign decision-makers on notice that opportunities for United States based employees must be offered in accordance with American laws barring discrimination in the workplace. This is not meddling in foreign affairs. It is nothing more than the application of United States law to those employed in the United States

Therefore, for the reasons stated here and in Petitioner's

Petition for a Writ of Certiorari, Petitioner requests that his Petition be granted.

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